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# Deer Crest Associates I, L.C. v. Silver Creek Development Group, LLC : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DEER CREST ASSOCIATES I, L.C. a  
Utah limited liability company,

Plaintiff/Appellant,

vs.

SILVER CREEK DEVELOPMENT  
GROUP, LLC,

Defendant/Appellee.

**APPELLEE’S BRIEF**

Case No. 20090108-CA

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Appeal from the Judgment of the Fourth Judicial District Court,  
Wasatch County, State of Utah  
The Honorable Derek Pullan, District Court Judge

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j) because this is an appeal from a final decision of the District Court. This appeal has been transferred to the Court of Appeals from the Supreme Court.

## **STATEMENT OF THE ISSUES**

### **A. Questions Presented and Standards of Review**

1. Did the District Court err in entering its Order dismissing Deer Crest Associates I, L.C.'s ("Deer Crest") Complaint and entering judgment in favor of Silver Creek Development Group, L.L.C. ("Silver Creek")?

2. Has the appellant preserved and/or asserted any legally recognized ground for challenging the binding decision of the arbitrator?

### **B. Standards of Review**

New issues on appeal: Claims not raised in the district court may not be raised for the first time on appeal. *Duke v. Graham*, 2007 UT 31, ¶ 26, 158 P.3d 540 (Utah 2007). A party must give the district court an opportunity to address the purported error or is precluded from raising the issue on appeal. *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 127 P.3d 1256 (Utah 2007).

District Court's Findings: A trial court's factual findings will not be disturbed unless they are shown by marshaling of all evidence in the record supporting the trial court's findings to be clearly erroneous. U.R.C.P. 52(a); *Bluffdale Mt. Homes, LC v.*



*Bluffdale City*, 2007 UT 57, ¶ 46, 582 Utah Adv. Rep. 41. The application of law to facts found at trial is a mixed question of fact and law. *Wayment v. Howard*, 2007 UT 56, ¶ 9, 144 P.3d 1147 (Utah 2007). This Court defers to the district court’s application of law to the facts, granting broad deference when the issue is extremely fact dependent. *Id.* “In addition, when appealing a highly fact dependent issue, the appellant has a duty to marshal the evidence.” *Id.* The law applied is reviewed for correctness. *Jones v. Barlow*, 2007 UT 20, ¶ 11, 154 P.3d 808 (Utah 2007).

District Court’s Conclusions of Law: Legal conclusions should be “reviewed for legal correctness.” *Morse v. Packer*, 973 P.2d 422, 424 (Utah 1999); *State v. Deli*, 861 P.2d 431, 433 (Utah 1993) (“We accord the trial court’s conclusions of law no deference but instead review them for correctness.”); *Kennecott Corp. v. Utah State Tax Commission*, 858 P.2d 1381, 1384 (Utah 1993) (“[W]e afford no deference because they are conclusions of law and are therefore reviewed for correctness.”).

### **C. Issue Preservation**

Silver Creek asserts that Deer Crest has not properly preserved various issues for appellate review. This Court’s rules require an appellant to demonstrate that issues raised on appeal were properly raised and preserved in the district court. U.R.A.P 24(a)(5)(A), (B). Deer Crest has failed to comply with this Rule. Further, because Deer Crest raises new issues for the first time on appeal, Silver Creek had no opportunity to address such issues below.

## **DETERMINATIVE PROVISIONS**

U.C.A. § 78B-11-101 *et seq* is of central importance to this appeal.

## **STATEMENT OF CASE**

### **A. Nature of the Case and Proceedings Below**

This is an action commenced by Deer Crest for Silver Creek's alleged breach of a contract for the construction of a portion of a condominium project in Wasatch County, Utah. Deer Crest filed this action in December 2007 against Silver Creek in District Court. Silver Creek filed a Motion to Dismiss on the grounds that Deer Crest had not made a demand for arbitration within thirty days after its claim had arisen, as provided for under the parties' Agreement and therefore Deer Crest's claim was barred. Record on Appeal ("R") at 39-45. In the alternative, Silver Creek sought an order from the Court compelling arbitration pursuant to the arbitration clause in § 19.1 of the construction contract. *Id.* The District Court granted Silver Creek's motion to compel arbitration and stayed the matter pursuant to statutory requirements. R. 76-78. The District Court ruled that Deer Crest waived its right to a judicial determination when it entered into an explicit agreement to resolve all disputes by binding arbitration.

Deer Crest then filed a claim with the American Arbitration Association. In response thereto Silver Creek filed a Motion to Dismiss and argued that Deer Crest had not made a timely demand for arbitration under the provisions of the construction agreement and thus, the American Arbitration Association lacked jurisdiction to consider

Deer Crest's claim. The arbitrator agreed and issued a written decision in which it ruled that "Deer Crest waived its right to arbitration under the Contract Documents by failing to file its demand within the time set forth in the Contract Documents. Therefore, [the court ruled] AAA lacks further jurisdiction to resolve this matter under the Contract Documents." R. at 81. Consequently, Deer Crest's claim was dismissed from Arbitration. *Id.*

### **B. Disposition in the District Court**

After the Arbitrator dismissed Deer Crest's claim as untimely, Deer Crest moved the District Court to lift the stay to allow it to litigate its claims in district court. R. 78-80. Silver Creek opposed the motion on the grounds that Deer Crest's claims against Silver Creek had been dismissed in arbitration pursuant to a binding arbitration agreement, and Deer Crest was precluded from asserting its claims in the courts. R. at 92-111. Following briefing and oral argument, the District Court denied Deer Crest's Motion to Lift Stay and dismissed Deer Crest's Complaint with prejudice, awarding Silver Creek its attorney fees. R. at 194-198.

### **C. Statement of Facts**

In July of 2005 the parties to this matter entered into an Agreement which contains a mandatory arbitration clause, stating the following:

All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof shall be decided by arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association unless

the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. The demand shall be made within (30) days after the claim, dispute or other matter in question has arisen. . . The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

R. at 23-27; Agreement § 19.1(emphasis added), addendum **Exhibit A**.

On February 5, 2007 Deer Crest terminated its Agreement with Silver Creek because of Silver Creek's alleged failure to timely complete the work pursuant to the terms of the Agreement. R. at 86.

In December 2007, approximately ten (10) months after the claim arose, Deer Crest originally filed its claims against Silver Creek in the District Court for the Fourth District of Utah, Heber Department. R. at 3-6. In response, Silver Creek filed a Motion to Dismiss asking the Court to dismiss the action as untimely pursuant to the contractual limitation period agreed to by the parties. R. at 40. In the alternative, Silver Creek requested the court to dismiss the judicial action and order the parties to arbitration. *Id.*

On February 5, 2008 the District Court issued its Ruling and Order denying Silver Creek's Motion to Dismiss in part, but granting the alternative request for arbitration. R. at 76-78. The Court ordered the parties to arbitrate the dispute and stayed the judicial proceedings "pending completion of the arbitration." *Id.*; Ruling and Order, addendum **Exhibit B**. In refusing to grant Silver Creek's motion to dismiss, the Court referenced

and adopted Deer Crest's position that "the timeliness of a demand for arbitration is for the arbitrator to decide." *Id.*; Ruling and Order p. 2.

On March 13, 2008, more than thirteen (13) months after the claim arose, Deer Crest commenced arbitration proceedings by filing a Notice of Intent to Arbitrate with the American Arbitration Association ("AAA"). Thereafter, Silver Creek filed a Motion to Dismiss, again raising the argument that Deer Crest's claims were not asserted within the contractual limitation period for the filing of claims. R at 81-87.

On August 5, 2008, the arbitrator issued a written Ruling on Respondent's Motion to Dismiss. ("Arbitrator's Ruling", addendum **Exhibit C**; R at 81-87). The arbitrator carefully analyzed the contract between the parties, including § 19.1 in particular, and concluded that the parties agreed to require that any claim be filed within thirty (30) days after the claim, dispute or other matter in question arises. Arbitrator's Ruling, p. 3; R at 81-87.

The arbitrator then considered the question of when the claim arose and concluded, as a matter of law, that the claims could not have arisen any later than February 5, 2007, "the date Deer Crest terminated its contract with Silver Creek because of breach." R. 81-87. Therefore, the arbitrator concluded that Deer Crest's claim was untimely and granted Silver Creek's Motion to Dismiss. *Id.* Significantly, Deer Crest

has not challenged the arbitrator's determination that its claim was untimely under the contract.

Deer Crest subsequently filed a Motion to Lift the Stay in the District Court from which this appeal is taken. R. at 79-80. By its Motion, Deer Crest sought to litigate this matter in District Court after it was dismissed from arbitration. Silver Creek filed an opposition to Deer Crest's Motion and asked that the Court dismiss Deer Crest's Complaint with prejudice. R. at 92-111. After briefing and oral argument on Deer Crest's Motion to Lift Stay, the District Court dismissed the case with prejudice and entered judgment in favor of Silver Creek. R. at 194-198. ("Order", addendum **Exhibit D**; R at 194-198). The District Court based its Order on the following findings of fact and conclusions of law:

**Findings of Fact:**

- 1) That the matter was properly referred to arbitration and that the arbitrator issued a written ruling granting Silver Creek's Motion to Dismiss, finding that Deer Crest failed to file a demand for arbitration within the thirty day limitation period set forth in the parties' agreement. Because of Deer Crest's failure to file a timely claim, the arbitrator had no jurisdiction to hear Deer Crest's claim. R. at 197.
- 2) On July 1, 2005, the parties entered into an AIA A101-1997 Standard Form of Agreement Between Owner and Contractor ("Agreement"). Paragraph 19.1 of the Addenda to that Agreement, which was made an enforceable part of the Agreement, requires that "[a]ll claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration ... . The demand [for arbitration] shall be made within thirty (30) days after the claim, dispute or other matter in question has arisen." *Id.* (emphasis added).

3) The Court, having reviewed the record, found that Deer Crest's demand for arbitration was filed beyond the thirty day limitation period set forth in paragraph 19.1 of the parties' agreement. *Id.*

### **Conclusions of Law:**

1) That the Agreement between the parties is enforceable, and that the parties knowingly and intentionally agreed to submit any claim or dispute arising out of the Agreement to binding arbitration and agreed to be bound by paragraph 19.1 of the Agreement and the thirty (30) day limitation on the time for filing an arbitration demand contained therein. R. at 196.

2) That Deer Crest's execution of the Agreement constituted a knowing and intentional waiver of any right to a judicial remedy under Article I, §§7 and 11 of the Utah Constitution.<sup>1</sup> *See Duke v. Graham*, 158 P.3d 540, 546 (Utah 2007). The Court concluded that strict enforcement of paragraph 19.1 of the Agreement would not violate Deer Crest's constitutional rights. R. at 196.

3) The Court concludes that Deer Crest having waived any right to a judicial remedy, and having had its arbitration claim dismissed for failure to timely file the same, Deer Crest has no right to seek a judicial remedy. R. at 196.

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<sup>1</sup> Notably, Deer Crest has not properly challenged the District Court's determination that Deer Crest knowingly and intentionally waived its right to a judicial remedy when it executed the Agreement. Although the Court characterized Deer Crest's waiver as a conclusion of law, it is either a finding of fact or a mixed question of fact and law. As such, appellant is required to marshal the evidence. Deer Crest has not marshaled the evidence to challenge this finding. Indeed, the pertinent and un rebutted fact is that Deer Crest signed the Agreement. *See* U.R.C.P. 52(a); *Bluffdale Mt. Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 46, 582 Utah Adv. Rep. 41(A trial court's factual findings will not be disturbed unless they are shown by marshaling to be clearly erroneous); *see also* *Wayment v. Howard*, 2007 UT 56, ¶ 9, 144 P.3d 1147 (Utah 2007) (Appellate Courts defer to the district court's application of law to the facts, granting broad deference when the issue is fact dependent). To the extent Deer Crest has challenged the Trial Court's findings of fact, such should be disregarded for its failure to marshal.

## **SUMMARY OF THE ARGUMENT**

Deer Crest's Complaint was properly dismissed with prejudice from the District Court because the Court had no authority or jurisdiction to hear Deer Crest's claim as it had been dismissed pursuant to a valid arbitration proceeding. Deer Crest has not challenged the arbitrator's decision on any statutorily recognized grounds. By intentionally and knowingly entering into a valid and binding agreement to arbitrate, Deer Crest waived its right to a judicial determination of its claims against Silver Creek.

Finally, Deer Crest's constitutional rights have not been violated because an arbitration proceeding affords due process and provides a party their "day in court" to the same extent as judicial proceedings.

## **ARGUMENT**

### **A. THE DISTRICT COURT'S ORDER DISMISSING DEER CREST'S COMPLAINT WITH PREJUDICE SHOULD BE AFFIRMED.**

1. The District Court Properly Dismissed Deer Crest's Complaint With Prejudice Because the District Court Had No Authority to Hear the Matter as it Had Been Dismissed by an Arbitrator Acting Within the Scope of and Pursuant to a Valid Arbitration Proceeding.

It is well established in Utah that "[a]rbitration is a method of dispute resolution involving one or more neutral third parties whose decision is binding." *Miller v. USAA Casualty Insurance Company*, 44 P.3d 663, 673 (Utah 2002). At arbitration, parties are afforded the opportunity to present evidence and examine witnesses. After evaluation of



the evidence, the arbitrator makes an award resolving the issues presented. Of paramount importance is the fact that “the arbitration award is binding and enforceable in court.” *Miller* at 673; U.C.A. § 78B-11-123; *see also* 4 Am. Jur. 2d Alternative Dispute Resolution § 193 (2008) (an arbitrator’s judgment has the same effect as a judgment of a court of last resort); *General Exchange Ins. Corp. v. Harmon*, 157 S.W.2d 126 (1941) (the arbitration judgment, if within the scope of the arbitration agreement, is as binding on the parties as a judgment of a court of law).

Under Utah law it has long been established that the award of an arbitrator determines the rights of parties as efficiently as a judgment secured by legal procedure and is binding on the parties until set aside or its validity is questioned in some proper manner. *Giannopoulos v. Pappas*, 15 P.2d 353 (Utah 1932). Indeed, “a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority.” *Id.* at 356.

In very limited situations, the law provides a mechanism whereby parties who are dissatisfied with an arbitration decision may seek review. However, judicial review of arbitration decisions is only on narrowly prescribed statutory grounds and is only

available in certain circumstances.<sup>2</sup> *See also DeVore v. IHC Hospitals, Inc.*, 884 P.2d 1246 (Utah 1994) (judicial review of arbitration awards should not be pervasive in scope or encourage repetitive adjudications but should be limited to the statutory grounds and procedures for review). Further, an arbitration award will not be disturbed on account of irregularities or informalities in the proceeding or because the court does not agree with the award. *Id.*

Deer Crest and Silver Creek entered into a negotiated and binding written contract which provided that all disputes arising thereunder would be submitted to and resolved by binding arbitration. *See* Agreement at § 19.1. By entering into a binding arbitration

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<sup>2</sup> *See* U.C.A. § 78B-11-124: (1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was:
  - (i) evident partiality by an arbitrator appointed as a neutral arbitrator;
  - (ii) corruption by an arbitrator; or
  - (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (d) an arbitrator exceeded the arbitrator's authority;
- (e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or
- (f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

agreement, the parties intentionally and knowingly waived their rights to have their claims resolved judicially. The parties' agreement to arbitrate is an enforceable and binding contractual agreement that precludes the parties from asserting claims in court. *See Duke v. Graham*, discussed *infra*. Deer Crest signed the Agreement and agreed to its terms. *See Agreement*. In fact, Deer Crest acknowledged the binding nature of the Agreement by submitting its claims to arbitration. R. at 81-87. Deer Crest's claims were subsequently adjudicated in arbitration and dismissed as having been untimely filed. *Id.* Because the parties contractually agreed to mandatory binding arbitration and because Deer Crest's claims have been dismissed with finality from an arbitration proceeding, no judicial appeal lies.<sup>3</sup>

Deer Crest cannot simply choose to set aside the arbitration decision because it disagrees with the outcome. Nor can the court second guess or review the arbitrator's decision, even though it disagrees with the decision. Therefore, the District Court's Order should be affirmed and Deer Crest's Appeal must be denied pursuant to the above authorities which hold that a decision reached in a valid arbitration proceeding is binding

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<sup>3</sup> Deer Crest now seeks to ignore the parties' contractual agreed-upon procedure for the adjudication of all disputes. Deer Crest argues that although it had knowingly and intentionally waived its right to a judicial determination of its claims, it should nonetheless have the opportunity to litigate its claims in district court after a decision dismissing this matter was rendered in a valid and binding arbitration proceeding. *See Brief generally*.

on the parties to the same extent as a judgment rendered in a court of law. *See Miller* at 673.<sup>4</sup>

2. The District Court Properly Concluded That The Parties Waived Their Rights to a Judicial Determination of All Claims.

Parties express their clear intention to waive their rights to a judicial determination of claims when they contract for and select mandatory binding arbitration as the sole forum for adjudication. Indeed, the Utah Supreme Court has recently affirmed this principle and held that “an agreement ... to submit to arbitration any existing or subsequent controversy arising between the parties to an agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” *Duke v. Graham*, 158 P.3d 540, 542 (Utah 2007). The *Duke* Court further held that parties waive “their right to a judicial proceeding through an express agreement to arbitrate” *Id.* at 546; *See also Pacific Development, L.C. v. Orton*, 23 P.3d 1035, 1039–1040 (Utah 2001) (where the Utah Supreme Court held that a written arbitration

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<sup>4</sup> Arbitration is not a mediation proceeding whereby parties voluntarily come together to reach settlement; rather, it is a “method of dispute resolution . . . whose decision is binding.” *Miller* at 673. As outlined above, the law in fact provides a means whereby dissatisfied parties are able to challenge and appeal an arbitrator’s decision in court; however, Deer Crest’s motion to lift the stay and re-commence litigation in district court is not an authorized means recognized under Utah law. *See* U.C.A. § 78B-11-124 (outlining the narrow and limited grounds upon which a party may ask the court to vacate an arbitration decision). A party is not free to simply ask that the court start over again and re-litigate the matter just because the party disagrees with the arbitration decision.

agreement constitutes a waiver of parties' rights to formal litigation and that when a party has waived its rights to a judicial determination, the court is barred from revisiting the arbitrator's decision).<sup>5</sup>

Here, the District Court concluded that:

. . . the Agreement between the parties is enforceable, and . . . the parties knowingly and intentionally agreed to submit any claim or dispute arising out of the Agreement to binding arbitration and agreed to be bound by paragraph 19.1 of the Agreement and the thirty (30) day limitation on the time for filing an arbitration demand contained therein.

R. at 196.

The District Court then analyzed the above Utah authorities and concluded that pursuant to the Agreement's arbitration provision

. . . Deer Crest's execution of the Agreement constitutes a knowing and intentional waiver of any right to a judicial remedy under Article I, §§7 and 11 of the Utah Constitution. *See Duke v. Graham*, 158 P.3d 540, 546 (Utah 2007).

R. at 196.

The District Court's conclusion is supported by Utah law and should be affirmed. Although Deer Crest does its best to distinguish the holdings of the foregoing authorities,

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<sup>5</sup> Deer Crest's attempt to distinguish *Kenny* is unpersuasive under the facts of this appeal. *Kenny* simply stands for the principle that where a party is contractually bound to follow certain procedures and timelines in order to invoke specified contractual rights, and the party fails to do so, the party waives his or her rights. *Kenny* at 998. Moreover, the trial court in *Kenny* did not provide a second recourse to a party when that party's claims had been dismissed in an arbitration proceeding. *Id.*

it fails to do so. As conceded by Deer Crest, “where a party is contractually bound to follow certain procedures and timelines in order to invoke a specific contractual right and fails to do so, the party waives that right.” *See* Brief at 13; *see also Kenny v. Rich*, 186 P.3d 989 (Utah App. 2008); *Brinton v. IHC Hosps., Inc.*, 973 P.2d 956, 966 (Utah 1998).

Here, Deer Crest knowingly entered into the Agreement to arbitrate its claims against Silver Creek. R. at 196-197; *see also* Agreement. Because the Agreement was an “express agreement to arbitrate”, Deer Crest “waived its right to a judicial proceeding . . .” *Duke* at 542. This case encompasses the precise situation as envisioned by *Duke*, i.e., because the Agreement is clear and unambiguous as to the parties’ intent to arbitrate their claims, the parties waived their rights to a judicial determination of any claims arising under the Agreement.

Deer Crest was bound by its agreement to arbitrate. Deer Crest failed to submit its claim to arbitration in a timely manner and therefore the arbitrator correctly dismissed the same. The District Court then correctly determined that because Deer Crest had waived its right to a judicial adjudication of its claims against Silver Creek, it had no jurisdiction or authority to review or ignore the arbitrator’s order. Therefore, judicial dismissal of Deer Crest’s Complaint was mandated. R. at 194-198.

3. The District Court's Dismissal of Deer Crest's Complaint Did not Violate Due Process or The Open Court's Provision of the Utah Constitution.

As set forth above, the District Court applied established Utah law and properly concluded that “strict enforcement of paragraph 19.1 of the Agreement would not violate Deer Crest’s constitutional rights.” R. at 196.

Utah law supports the District Court’s conclusion that a freely-entered-into arbitration agreement is a valid waiver of judicial process and does not violate the parties’ rights to due process. *Duke v. Graham*, 158 P.3d 540, 546 (Utah 2007); *Jenkins v. Percival*, 962 P.2d 796, 799 (Utah 1998); *Lindon City v. Eng’rs Constr. Co.*, 636 P.2d 1070, (Utah 1981) (where the Utah Supreme Court held that due process of law does not necessarily mean judicial action; rather, due process is in fact afforded by arbitration). As in *Duke*, Deer Crest’s argument that it was not afforded due process “fails because [Utah Courts] have clearly held that arbitration proceedings do not violate [Due Process or the Utah Open Court’s provision] . . . [when] the parties have waived their right to a judicial proceeding through an express agreement to arbitrate.” *Duke* at 546.

Deer Crest does not contest this principle; rather, Deer Crest simply makes the unsupported argument that since the full merits of its claims have not been heard in the District Court, that its constitutional rights have been violated. However, the District Court concluded that based on Deer Crest’s knowing and intentional waiver of its right to

a judicial determination, the court was divested of authority to hear the matter.<sup>6</sup> R. at 196. Thus, pursuant to *Duke*, the trial court's dismissal of Deer Crest's claims do not violate Deer Crest's constitutional rights under the Due Process Clause or the Open Courts Provision of the Utah Constitution. *Duke* at 546.

Moreover, Deer Crest's argument that it was denied due process because the full merits of its claims were not heard is undermined by long-established Utah law. The appellate courts of Utah have consistently held that a dismissal with prejudice based on procedural deficiencies does not violate due process or parties' constitutional rights.

*Colosimo v. Roman Catholic Bishop of Salt Lake City*, 104 P.3d 646 (Utah App. 2004).<sup>7</sup>

Therefore, because Deer Crest waived its right to a judicial adjudication of its claims against Silver Creek and because its claims were properly dismissed from arbitration, the trial court did not violate Deer Crest's constitutional rights in dismissing its Complaint with prejudice.

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<sup>6</sup> As set forth in Section I, above, Courts have authority to review arbitration awards only on narrowly proscribed statutory grounds. Deer Crest has not challenged the arbitrator's ruling on any of these narrow grounds.

<sup>7</sup> See also *Gordon v. Maughan*, 204 P.3d 189 (Utah App. 2009) (where Utah Court of Appeals held that the dismissal of an appeal from justice court when defendant failed to follow appropriate procedures did not violate the defendant's constitutional rights); *Rohan v. Boseman*, 46 P.3d 753 (Utah App. 2002) (where Utah Court of Appeals affirmed dismissal with prejudice on procedural grounds when plaintiff failed to prosecute its case).



4. The Arbitrator's Decision to Apply the Thirty Day Time Limit to Seek Arbitration Is Binding and Enforceable.

Contrary to Deer Crest's argument, the Trial Court did not apply a thirty day statute of limitations to Deer Crest's claims against Silver Creek; rather, the Court dismissed the case based on the parties' Agreement and upon a final decision entered by the Arbitrator. R. at 196. However, even if the thirty day limitation set forth in section 19.1 of the Agreement is construed as a statute of limitations, such is not unreasonable.

Utah courts have endorsed the widely applied principle that parties may agree on a shorter limitation of time for commencing an action for breach than is provided by the statute of limitations. This principle has been confirmed and established as far back as 1919 in *Clark v. Lund*, 184 p. 821 (Utah 1919) (parties to a contract may agree on a shorter limitation of time for commencing an action for breach than is provided by the statute of limitations, provided the period agreed on is not unreasonable) and affirmed by the Supreme Court in *Hoeppner v. Utah Farm Bureau Insurance Company*, 595 P.2d 863 (Utah 1979) (where Supreme Court held that Contractual limitations of time in which to bring actions on contract, if reasonable, are valid, binding and enforceable).<sup>8</sup>

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<sup>8</sup> Other jurisdictions generally are in agreement with Utah law. Under Massachusetts law, contracting parties may agree upon a shorter limitation period as long as it is reasonable. *Bull HN Information Systems, Inc. v. Hutson*, 118 F. Supp. 2d 55 (D. Mass. 1999, rev'd on other grounds 229 F.3d 321 (1st Cir. 2000) (applying Massachusetts law).

Thus, the arbitrator made a well reasoned and well supported decision to enforce the thirty day contractual limitation period. But that is not the issue on this appeal because the parties agreed to be bound by the arbitrator's decision, without a right of appeal. Consequently, the decision of the arbitrator, right or wrong, if made in good faith and without any violation of U.C.A. § 78B-11-124, is not subject to judicial review. As noted above, in this case appellant has not raised below nor asserted in this appeal any ground to vacate the award under § 78B-11-124.

Therefore, because Deer Crest expressly consented and agreed to bring any claim against Silver Creek within thirty days after it had arisen, because the law allows parties to contract for shorter time limitations than the applicable statute of limitation, and because the arbitrator's decision is not subject to review or appeal, Deer Crest's claims are barred as a matter of law.

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Under New York law, parties to a contract may agree to limit the period of time within which an action must be commenced to a shorter period than that provided by the applicable statute of limitations. *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005) (applying New York law).

Under New York law, parties to a contract may designate a reasonable period of limitations within which a claim arising out of the contract is to be commenced, even if that period is shorter than the statutory period. *North American Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.*, 413 F. Supp. 2d 295 (S.D. N.Y. 2006) (applying NY law).

**B. DEER CREST CANNOT RAISE THE ISSUE OF AMBIGUITY OF AGREEMENT IN ITS APPEAL BECAUSE IT WAS NOT RAISED BELOW.**

Although Deer Crest briefly attempts to argue that the District Court erred by not finding the Agreement to be ambiguous as to the consequences of failing to abide with section 19.1 of the Agreement, Deer Crest has not properly preserved this issue for appeal and cannot be heard to argue it now. *See* Brief at p. 15-16. Deer Crest did not argue below that the Agreement was ambiguous and did not preserve this issue below or in its Docketing Statement. R. at 143-150; 194-198. It is well established that courts will not consider matters raised for the first time on appeal. *Wade v. Stangl*, 869 P.2d 9, 11 (Utah App. 1994); *see also Brookside Mobile Home Park, LTD. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968, 972; *see also State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993) (stating that for an issue to be properly preserved for appellate review, it must be raised to a level of consciousness such that the trial judge can consider it).

Here, as demonstrated from the trial court's Order and record below, Deer Crest did not argue that the Agreement was ambiguous in the District Court proceedings. Therefore, Deer Crest's argument that the Agreement is ambiguous with respect to the parties' intentions of the consequences of failing to abide with section 19.1 of the Agreement must be disregarded.

### **CONCLUSION**

Based on the foregoing points and authorities, Silver Creek respectfully requests that this Court deny Deer Crest's Appeal and Affirm the District Court's Order herein.

DATED this \_\_\_\_ day of June, 2009.

HILL, JOHNSON & SCHMUTZ

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**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the \_\_\_\_ day of June, 2009 she caused a true and correct copy of the foregoing to be delivered to the following:

Eric G. Easterly  
2524 Fairway Village Drive  
P.O. Box 681238  
Park City, Utah 84068-1238

Sent Via:

\_\_\_\_\_ Hand-Delivery  
\_\_\_\_\_ Facsimile  
  X   Mailed (postage prepaid)

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# **ADDENDUM**

## TABLE OF CONTENTS

<b><u>Exhibit</u></b>	<b><u>Title</u></b>
A	Agreement
B	Ruling and Order
C	Arbitrator's Ruling
D	Order